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No. 677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

JAMES WALDO MC CORMICK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION.

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The brief for the United States in opposition to the Petition for Certiorari contains an error which the petitioner feels is necessary to bring to the Court's attention. At pages 9-10 of the brief in opposition, the government argues under paragraph 1-A that the petitioner made no attempt to comply with the requirement of Rule 41(e) of the Federal Rules of Criminal Procedure. Therefore, in addition to the main contention that the motion to suppress was properly denied on the merits, the government argues that there was some infirmity in the motion to suppress itself.

When the petitioner's attorney read the government's brief in opposition, he called paragraph 1-A to the attention of the United States Attorney's office for the Northern District of Illinois. As a result, they referred

the matter to the Department of Justice in Washington, D. C. and after telephonic communications, portions of the last four lines of paragraph 1-A were stricken. (Petitioner understands this correction was made on all copies of their brief filed with the Court.)

Petitioner, however, feels that this concession by the government does not go far enough toward erasing a possible erroneous impression which this Honorable Court may have on this point.

It is true that the motion to suppress was made when the case was called for trial. Counsel for the petitioner explained to the Court the reason for the delay, and the Court permitted the defendant to make the motion and in so doing exercised its discretion under Rule 41(e), which provides:

> "• • • but the court in its discretion may entertain the motion at the trial or hearing."

The government, of course, objected to the motion, but as indicated it was permitted. It was understood that, while the motion was made orally, opportunity would be given the defendant to reduce it to writing and subsequently file it.

In the printing of the appendix, on appeal to the Court of Appeals for the Seventh Circuit, the question of timeliness was never raised below nor made an issue and, consequently, this portion of the record of the trial proceedings was not transcribed.

Petitioner suggested to the government that the entire paragraph 1-A should be stricken from the brief in opposition, but the government indicated that it would only make the correction to the extent of portions of the last four lines. If there be any doubt in the Court's mind, peti-

tioner would ask leave to have that portion of the record transcribed and submitted to this Court.

One other matter is respectfully called to this Court's attention. That is, a statement by the government in its brief in opposition, at page 10, footnote 3. of its brief. In lines 8 to 10, the statement is made:

> "The evidence was that Agent Webb made a *distinctive marking* on this machine about a month before it was shipped and *was personally present when it was crated* and shipped via Railway Express." (Emphasis supplied.)

There is no proof whatsoever in the record that Agent Webb was personally present when the machine was crated. So far as Agent Webb knows, he had no personal knowledge of the contents of the crate. (See the Petition, pp. 6-7, and the Govt. Appendix, pp. 11-12.)

It is also stated in lines 12 to 13 of footnote 3 on page 10 of the government's brief in opposition that the "affidavit was that affiant and other agents were present when the package bearing all the *distinctive markings described by Webb* arrived in Hagerstown, etc." There is no such evidence in this record.

Respectfully submitted,

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